

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA S. MILLER)	
Claimant)	
)	
VS.)	
)	
CATHOLIC CHARITY COMMUNITY SERVICE)	
Respondent)	Docket No. 1,042,450
)	
AND)	
)	
VIRGINIA SURETY CO., INC.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 28, 2011, Award entered by Administrative Law Judge Marcia L. Yates. The Board heard oral argument on November 2, 2011. Michael R. Lawless, of Lenexa, Kansas, appeared for claimant. Robert J. Wonnell, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant met her burden of proof that she sustained personal injury by accident on May 23, 2007, that arose out of and in the course of her employment with respondent. The ALJ also found claimant had a permanent partial impairment to her whole body of 10 percent to her cervical spine and 7.5 percent to her lumbar spine, as well as a 5 percent permanent partial impairment to her left upper extremity. The ALJ held claimant was entitled to a work disability and that she had a 100 percent wage loss. The ALJ found Michael Dreiling's task loss did not include claimant's entire work history and held it should be disregarded. Since Dr. John Pazell was the only physician to render a task loss opinion and that opinion was based on Mr. Dreiling's task list, the ALJ found claimant had a 0 percent task loss. The ALJ concluded that claimant had a 50 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the Board considered the two reports issued by the court-appointed independent medical examiner, Dr. Terrence Pratt, dated March 17, 2009, and May 15,

2009. Also, during oral argument to the Board, the parties agreed that if this claim is found compensable, the ALJ's determinations as to the percentages of functional impairment should be affirmed.

ISSUES

Respondent contends claimant failed to show she suffered an accidental injury that arose out of and in the course of her employment, as the evidence showed she had no lesion or change to the physical structure of her body as a result of the May 23, 2007, accident. Further, respondent argues the evidence does not show that claimant's alleged aggravation of her preexisting condition caused any increased disability, and she is therefore barred from receiving compensation under the Workers Compensation Act pursuant to K.S.A. 2010 Supp. 44-501(c). In response to claimant's argument that Dr. MacMillan's opinions and ratings were not based on the 4th edition of the *AMA Guides*,¹ respondent shows that Dr. MacMillan, in his deposition testimony, stated that he used the 4th edition of the *AMA Guides* in calculating his ratings.

Claimant asserts she met her burden of proof that she sustained personal injury in the motor vehicle accident of May 23, 2007. Further, claimant argues there was no evidence that she had a preexisting condition that caused any impairment before May 23, 2007, and that all her current symptoms and disability are caused by the work-related accident that occurred on that date. Claimant asks the Board to modify the Award and find that she is permanently, totally disabled. In the alternative, claimant argues the ALJ erred in finding that Mr. Dreiling's task list was incomplete. Claimant argues she had a task loss as testified to by Dr. Pazell. Claimant also contends the record does not show that Dr. MacMillan's opinions and ratings were based on the 4th edition of the *AMA Guides*.

The issues for the Board's review are:

(1) Did claimant suffer an accidental injury that arose out of and in the course of her employment with respondent?

(2) Did the evidence show that claimant had a preexisting condition and, if so, did the work-related accident of May 23, 2007, cause her any increased disability? If so, is respondent entitled to a credit pursuant to K.S.A. 2010 Supp. 44-501(c)?

(3) What is the nature and extent of claimant's disability?

(a) Is claimant permanently totally disabled?

(b) If not, what is her percentage of work disability? Did the evidence show she has a task loss as testified to by Dr. Pazell?

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

FINDINGS OF FACT

Claimant began working for respondent in September 2005 as a personal care attendant and home health aide. Claimant would see five to seven clients a day and was paid a trip fee for her travel between clients' homes. On May 23, 2007, claimant had finished with her first client of the day and was en route to the home of her second client when she stopped at a stop light. She had been stopped about a minute when she was hit from behind. She said she then pushed hard on the brake with her left leg pushing into the floorboard. She was immediately hit from behind a second time. The impact from the second collision lifted her up, and the seat belt grabbed her by the neck. Claimant said the vehicle immediately behind her was an Ford F-150 pickup, and the pickup was hit from behind by woman driving a Saturn.

Photographs of the vehicles in the accident show the Saturn had extensive damage to its front end. The pickup had some scratches on its rear; there were no photographs of the front of the pickup. The photograph of the rear of claimant's vehicle showed no visible damage, although claimant testified there was a small dent in the rear bumper. Claimant said she called her supervisor, Betsy Holzworth, from the accident scene and was told this was not a workers compensation situation. Ms. Holzworth did not say anything about medical treatment for claimant.

Claimant said that after the accident, she was feeling pain but went to the next client's house. After she finished with the client, she went to the emergency room at Kansas University Medical Center (KUMC). There she complained of moderate pain in her low back, left shoulder and neck. The emergency room notes indicate claimant was in a motor vehicle accident with minimal damage to her vehicle. The nurses notes indicated claimant had no pain over her spine on palpation. She was given prescriptions for muscle relaxers and anti-inflammatory medication and was then released.

Claimant later, again on her own, went to Swope Health Services, where she was given a refill for her medications. She also went to a chiropractor, Dr. Shane Bisson, complaining of low back pain with numbness into the left leg, mid back pain, neck pain, arm problems, left shoulder pain and spasms. Claimant first saw Dr. Bisson on June 1, 2007, and his last date of treatment was July 17, 2007, for a total of 21 office visits/treatments.

On June 1, 2007, claimant's supervisor, Ms. Holzworth, contacted claimant and told her to fill out some paperwork and then see respondent's workers compensation physician. Claimant was sent by respondent to Dr. Kimberly Cater at OHS Compcare. She was put on modified duty with a 10-pound lifting restriction and was sent to physical therapy. Dr. Cater raised her lifting restriction to 25 pounds on June 7, 2007, and on June 22, 2007, her lifting restriction was raised to 35 pounds up to waist height only. Claimant was treated by Dr. Cater about six weeks and then was referred by Dr. Cater to Dr. Jennifer Finley.

Dr. Finley is board certified in physical medicine and rehabilitation. She first examined claimant on July 25, 2007. At that time, claimant's main complaints were left shoulder pain, low back pain, numbness in her ring finger and little finger, and numbness in her legs after sitting more than 30 minutes. Dr. Finley diagnosed her with left shoulder girdle myofascial pain syndrome, left acromioclavicular joint osteoarthritis, left supraspinatus tendinopathy, lumbar strain, probable gastroesophageal reflux disease/bronchospasm, and possible lymphedema in the bilateral lower extremities. Dr. Finley noted claimant had extremely poor posture. She recommended claimant continue with her light duty restrictions and said she was a good candidate for trigger point injections or acupuncture.

Dr. Finley continued to treat claimant. On September 5, 2007, claimant complained of a stiff neck. Claimant reported she sustained a new injury when a client had pulled her unexpectedly. Claimant reported that her left shoulder was a lot better. Her posture was still poor and cervical range of motion was slightly abnormal. By October 15, 2007, claimant had improved overall but still had left shoulder girdle myofascial pain syndrome, left acromioclavicular joint osteoarthritis, and left supraspinatus tendinopathy. Dr. Finley released claimant from treatment on that date with no restrictions. She stated that during her treatment of claimant, there was evidence of test manipulation or symptom magnification.

Dr. Finley stated the only explanation for claimant's numbness in her ring and little fingers would be myofascial pain. She stated there were no findings of radiculopathy and no loss of reflexes or sensory loss. There were no findings on examination to support any nerve-related pressure. She said myofascial pain can cause numbness, and the numbness could have been caused either by the accident or from claimant's bad posture. Claimant had trigger points in her left low cervical and upper thoracic muscles, which Dr. Finley attributed to claimant's posture. She did not believe it was a result of the car accident.

Dr. Finley has not seen claimant since October 15, 2007. On December 13, 2007, she wrote respondent stating that based on the *AMA Guides*, claimant had 0 percent impairment. Dr. Finley testified that under the definition of injury as set out in the Workers Compensation Act, claimant did not suffer any injury as a result of the May 23, 2007, motor vehicle accident. Dr. Finley stated that claimant does not need any future medical treatment as a result of the accident but she does need to continue working on her posture and body mechanics.

Dr. Finley said based on x-rays provided to her by Dr. Cater, claimant had some preexisting conditions. She concluded that the accident did not cause any increased disability in the claimant.

Dr. Finley reviewed a task list prepared by Michelle Strecker. She stated that based on her last examination of claimant, there were no tasks on the list that claimant would be

unable to perform. Claimant testified it was her understanding, however, that Dr. Finley expected her to request job assignments where she would not have to lift, did not involve going up or down stairs, and did not involve moving the client in a bed. Claimant said she has never had a client she could care for with those limitations.

Dr. Terrence Pratt examined claimant on March 17, 2009, at the request of the ALJ to evaluate and treat her if necessary. Claimant told him she was stopped at a light restrained in her car when she was rear-ended. Claimant told Dr. Pratt she had immediate discomfort in her left shoulder and low back. She went to the emergency room at KUMC and received medications. She was seen at an occupational clinic where she received two weeks of physical therapy to her shoulder.

At the time of the examination, claimant described her neck symptoms as an ache with variable severity on the left. She had a pinching of the left arm and had a heaviness going into her forearm that would sometimes go into the hand. She said the neck symptoms were slight at first but became more intense when she discontinued her medication. She also reported stabbing pain starting in the mid back radiating to the low back. She had posterior symptoms radiating into the left lower extremity and sharp anterior leg involvement bilaterally. She reported lower extremity numbness bilaterally while sitting and weakness in the lower extremities with difficulties going up stairs.

After taking a history, reviewing claimant's medical records and performing a physical examination, Dr. Pratt diagnosed claimant with left shoulder syndrome with acromioclavicular arthrosis and rotator cuff tendinopathy, low back pain with multi-level degenerative disc disease, and cervicothoracic complaints with reported history of myofascial pain. Dr. Pratt had no recommendations for further treatment or testing of claimant's left shoulder complaints. He recommended an MRI of the cervicothoracic and lumbosacral regions of the spine, with any further treatment options depending on the results of those studies. Dr. Pratt noted that claimant gave inappropriate responses in his examination.

In a May 15, 2009, addendum to Dr. Pratt's report, he stated he reviewed the results of the MRI of the cervical region which revealed a protrusion of disc material on the right at C4-5 and C6-7 causing encroachment on the right neural foramina and impression on the anterior right lateral aspect of the thecal sac. The MRI of the lumbosacral region showed changes with marked left neural foraminal encroachment at L5-S1 and moderate bilateral neural foraminal encroachment at L4-5. Dr. Pratt recommended consideration of epidural injections and a consult with a surgical specialist for cervical and lumbosacral involvement.

Dr. John Pazell, a board certified orthopedic surgeon, examined claimant on December 9, 2009, at the request of claimant's attorney. He took a history of the accident from claimant and reviewed her medical records. She told him she had her feet on her brake at the time of the accident and was braced so hard she was lifted off the seat.

Claimant told him her major complaints were that her low back always hurts and the pain travels down her left leg. She told him her legs wanted to buckle under her, and she could not sit, stand or walk long without pain. She said her left shoulder always hurt and her arm and shoulder felt like a heavy weight. She could not describe how the left side of her neck felt. She had muscle weakness in her arm and legs. She complained of numbness in her legs, particularly on the left. She was using a cane and had a limp. She took a sleep aid because of the pain. Dr. Pazell indicated claimant's complaints were consistent with the MRI findings he reviewed.

After performing a physical examination, Dr. Pazell diagnosed claimant with C4-5 and C6-7 arthrosis with radiculopathy and L4-5 and L5-S1 arthrosis with radiculopathy. Dr. Pazell said claimant had unilateral atrophy in her left leg, which is a significant sign of radiculopathy. He did not find any abnormality to claimant's left shoulder. He opined that the direct and proximate cause of her impairment was the automobile accident of May 23, 2007.

Based on the *AMA Guides*, Dr. Pazell rated claimant as being in DRE III for the cervical spine for a 15 percent whole person impairment. For the lumbar spine, he found claimant to be in DRE III for a 10 percent whole person impairment. These combine for a total of 24 percent permanent partial impairment to the whole body.

Dr. Pazell did not believe surgery would be in claimant's best interests but if it should be necessary, provision should be made for potential surgical treatment. He recommended claimant be referred to a pain management specialist for injection therapy to both her cervical and lumbar spine.

Dr. Pazell believed claimant should be restricted from sitting or standing for longer than 30 minutes each. She should be limited to light work activity only. He said that using a cane would protect her from falling and assist her in standing. He also said claimant should have a lifting/carrying limit of 20 pounds. Dr. Pazell reviewed the task list prepared by Michael Dreiling. Of the 22 tasks on the list, he opined that claimant was unable to perform 10, which computes to a task loss of 45 percent.² It was his opinion that claimant is permanently and totally disabled from engaging in gainful, substantial employment.

Dr. Pazell noted that x-rays taken around the time of the accident showed claimant had degenerative changes in her spine, as well as some spurring. He said her degenerative changes or any spurring would not be related to the accident and would be a preexisting condition. Dr. Pazell also said based on her age, claimant would have had some form of degenerative disc disease in her cervical, thoracic and lumbar spine on the

² On Task No. 22, driving to client's residences, Dr. Pazell said if the drive was more than 30 minutes, claimant would be unable to perform that task. If claimant was unable to perform Task No. 22, her task loss would be 50 percent.

date of the accident. However, the degenerative disc disease was not causing her any impairment at that time because she was leading an active work life. It is Dr. Pazell's opinion that the car accident aggravated claimant's degenerative disc disease.

Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, evaluated claimant on July 28, 2010, at the request of respondent. Dr. MacMillan reviewed claimant's medical records, the Kansas motor vehicle accident reports, and the transcript of claimant's deposition taken April 14, 2010. Claimant complained to Dr. MacMillan of numbness and a pins and needles sensation in her left hand. She also complained of a variety of aches and pains in the fingers of her left hand. She complained of progressive weakness in her lower extremities and said she had started using a cane. Claimant indicated to Dr. MacMillan that her best guess was she could sit about 30 minutes at a time. She did not answer his question as to how long she could stand or walk.

On physical examination, Dr. MacMillan found no soft tissue swelling or tenderness. He performed several diagnostic tests, all of which were normal. He obtained x-rays of claimant's cervical spine, lumbar spine, and left shoulder. The x-rays of the cervical spine showed some minimal degenerative changes. The x-ray of her shoulder indicated she had mild degenerative changes of her acromial clavicular joint. The x-ray of the lumbar spine also revealed that claimant had some arthritic facet changes and mild scoliosis. Claimant's thoracic spine could not be visualized but Dr. MacMillan said she might have right thoracic scoliosis as well.

Based on the *AMA Guides*, Dr. MacMillan rated claimant as having a 5 percent whole body impairment of her cervical spine, a 5 percent whole body impairment of her lumbar spine, a 10 percent impairment of the left upper extremity for carpal tunnel syndrome and a 10 percent impairment of the left upper extremity for cubital tunnel syndrome. He opined that her current impairments are not related to the motor vehicle accident of May 23, 2007, but, instead, were related to her age, gender and body habitus. The impairments for claimant's cervical and lumbar spine are based on age-related degenerative changes evidenced on x-rays and MRIs. The impairments for carpal and cubital tunnel syndrome both appear related to other activities or physiology but are not the result of an accident or injury. Dr. MacMillan opined that claimant's use of a cane was not related to the May 23, 2007, accident. Dr. MacMillan noted that claimant had complaints of low back pain before the accident in May 2007. He testified he did not believe claimant suffered any permanent aggravation of a preexisting condition as a result of the motor vehicle accident, and the accident did not cause claimant any increased disability.

Dr. MacMillan noted that claimant reported some left-sided posterior neck discomfort. He stated that those symptoms were not reported on the date of the accident at the time she went to the emergency room and appeared to have developed some time later. He further opined that those symptoms should not be causally related to the motor vehicle accident of May 23, 2007. Dr. MacMillan stated that symptoms that are related to an accident or injury typically occur at the time of the accident or injury. "They don't develop after an extended

hiatus³. However, after reviewing the emergency records of May 23, 2007, and Dr. Bisson's records, Dr. MacMillan acknowledged that there were some indications of pain in the area of claimant's lumbar spine and left shoulder early on after the accident. Nevertheless, he opined that claimant's lower lumbar facet joint condition is an age-related degenerative change.

Dr. MacMillan believed that the treatment provided to claimant between the date of the accident and the end of June 2007 appeared appropriate and related to the accident, but the treatment she received later than that did not appear appropriate or related. Dr. MacMillan stated that symptoms related to an accident improve over time. They don't progressively worsen, and claimant's history is one of someone who started off with very limited complaints that became more and more encompassing, which is not consistent with the natural history of an injury.

Based on the definition of injury as set out in the Workers Compensation Act, Dr. MacMillan opined that claimant did not suffer an injury as a result of the motor vehicle accident. He did not believe that claimant would require any future medical treatment as a result of the motor vehicle accident. Dr. MacMillan testified he believed that because of claimant's age, gender, body habitus and numerous physical complaints, it would be unlikely any employer would hire her. However, that would not be related to the motor vehicle accident.

Claimant was off work after the accident and returned on July 1, 2007. She said she told Ms. Holzworth that she needed to work with a client that would not require her to do any lifting. Claimant only worked with one client after she returned to work. She would make two visits per day to the client and would help the client dress, make her a light breakfast, and do her laundry. In September 2007, the client was hospitalized and claimant's services were not needed. Claimant has not accepted any assignments from respondent since that day. Claimant said she resigned her position with respondent. She said she has not looked for another position, and she is unable to perform the type of work she had always done in the past. She said she has not gone back to work because she is not physically able to.

Betsy Holzworth, claimant's supervisor, testified that personal care attendants help clients with bathing, dressing, assisting to the bathroom. The job may also involve light housekeeping and meal preparation. A homemaker/companion is not allowed any hands on care but may be required to perform housecleaning, cooking and marketing. Ms. Holzworth said when she received clients, she would call those employees qualified to do the assignments necessary and offer them the job. The employee can either accept the job or turn it down. Ms. Holzworth said if she has an employee with physical disabilities or limitations, on occasion there will be clients whose requirements fit within those limitations, and she can still place the employee.

³ MacMillan Depo. at 19.

Following the accident on May 23, 2007, claimant needed accommodations, which respondent provided. Ms. Holzworth testified that claimant was concerned that she was not able to do the job anymore. Ms. Holzworth said she could place claimant in a companion sitter position, which would be within Dr. Pazell's restrictions of light-duty work activities where she could sit or stand for no more than 30 minutes each. She testified she offered companion/sitter positions to claimant, but the positions were declined for various reasons. Claimant denied respondent offered her a position wherein all she had to do was read to a patient. Ms. Holzworth said if claimant had continued to accept clients, respondent would have kept her on as an employee. Respondent inactivated claimant from its list of personnel on May 7, 2008. Ms. Holzworth could not recall a conversation in which claimant indicated she needed to terminate her employment. She denied claimant ever told her about an incident in which, after the accident, a client grabbed her and she was concerned about her safety.

Ms. Holzworth said she considered claimant to have been a very good employee. Claimant did not try to shirk her duties, and Ms. Holzworth received good reports about her from clients and clients' families.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant on March 1, 2010, at the request of claimant's attorney. He prepared a list of 22 tasks that claimant had performed in the 15-year period before she was injured on May 23, 2007. He identified her employers as Total Petroleum, Texaco Star Mart, K-Mart, Arby's, Wal-Mart, Trios, Bob Evan's, Reinsberger, Kansas City Home Care, and Catholic Charity Community Service.

Claimant told Mr. Dreiling she was a high school graduate. She was a certified nurse's aide and home health aide, having taken training through community colleges. She was not working at the time of the interview and reported she had been receiving Social Security Disability benefits since her work injury. Mr. Dreiling said claimant had worked for stores or companies as a convenience store clerk. She also worked as a cashier in several work settings. She had done some waitressing. She had one job where she was a driver transporting railroad employees to their job sites. The last two jobs claimant held before the injury were doing household care services for clients.

Claimant had not applied for jobs in the labor market. Claimant told Mr. Dreiling she believed she could not return to the type of work she had done in the past due to the prolonged standing and walking requirements. She said she would have difficulty doing the driving position because of prolonged sitting, stating she could only tolerate sitting for 30 minutes at a time. She also said she could stand less than 30 minutes at a time.

Mr. Dreiling opined that if claimant actually could not sit or stand for more than 30 minutes at a time, that limitation would limit her ability to do light-duty work, and he felt she

would be essentially realistically unemployable in the labor market.⁴ He noted that claimant had a 100 percent wage loss because she was not working at the time of the assessment.

Michelle Sprecker is a vocational rehabilitation counselor. At the request of respondent, she met face-to-face with claimant on December 14, 2010, for five hours. She said during that meeting, claimant did not voice any complaints of pain, but she did mention that her legs were swelling. Claimant did not alternate standing and sitting throughout the meeting. Claimant was using a cane during the interview. Ms. Sprecker also had two telephone conversations with claimant in order to complete the interview. Ms. Sprecker prepared a list of 66 tasks that claimant had performed in the 15-year period before her accident, which was based on 19 different jobs.

Ms. Sprecker reviewed Mr. Dreiling's task list and found her list and his were not identical. Ms. Sprecker's list showed more jobs than did Mr. Dreiling's list. Mr. Dreiling's list did not include a job working as a cashier in an office building in Overland Park. His list also did not include claimant working as a CNA for a nursing home in Gardner, Kansas. Nor did his list include a telemarketer position for Direct Security or a job as a childcare worker. Ms. Sprecker agreed with claimant's attorney that many of the jobs claimant had in the 15-year period before her injury were more or less duplicative. But when claimant worked for Texaco Star Mark, she had to record tags of vehicles that drove off with gas and set up barriers for the car wash. Those were not tasks she had to perform anywhere else.

Claimant told Ms. Sprecker that she was a high school graduate and completed CNA training at Kansas City, Kansas Community College and her home health aide training through Johnson County Community College. Claimant said she completed one year of a computer training program at Kansas City, Kansas Community College. Claimant currently uses a computer and knows how to type. Claimant was not working at the time of Ms. Sprecker's interviews. Claimant told Ms. Sprecker she would like to work if she were to find a job paying \$13 to \$14 per hour and the job was within a 20-mile radius of her home.

After meeting with claimant, Ms. Sprecker performed a current labor market review. She was able to identify current openings for positions which could fall within the physical restrictions identified by physicians who had either treated or examined claimant. She identified jobs in the Kansas City area that existed in the areas of assembly or production, security officer, counter attendant, receptionist or information clerk, and hand packager. They were all entry level positions that were light or sedentary in nature. It was Ms. Sprecker's opinion that based on the physical restrictions placed on claimant, claimant retained the ability to perform those jobs. She said selective placement may be necessary when factoring in Dr. Pazell's restriction concerning sitting and standing for 30 minutes. But

⁴ At the time of Mr. Dreiling's assessment no doctor had restricted claimant to sitting or standing for no more than 30 minutes. Since Mr. Dreiling's assessment but before his deposition, Dr. Pazell placed that restriction on claimant.

Ms. Strecker believed that claimant was employable. She did not believe that claimant was permanently, totally disabled. In coming to her conclusions, Ms. Sprecker factored in claimant's age, her prior training and education, driving ability, medical restrictions, and past history of jobs.

Claimant stated she injured her back in the past, probably in the 1980s, but it was a one-day thing and the pain did not last. She had complained of pain in her low back, neck and shoulder in 2004. She did not have daily problems with her back or neck at the time of the accident. She claims that currently she is unable to sit for more than 30 minutes at a time without having an issue with her low back and legs. She cannot stand more than 30 minutes at a time. Her legs will go numb. She uses a cane about 99 percent of the time.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

K.S.A. 2010 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment.

⁵ K.S.A. 2010 Supp. 44-501(a).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁷

K.S.A. 2010 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁸ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁰

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks

⁷ *Id.* at 278.

⁸ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁰ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*¹¹, held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

ANALYSIS

The ALJ found claimant's testimony to be credible and consistent. The Board agrees. The ALJ also found the expert opinion testimony of Dr. Pazell to be more credible than that of Dr. MacMillan. The Board agrees with the ALJ in this regard as well. Dr. MacMillan appeared to have formed his conclusions based upon an inaccurate understanding of claimant's treatment history and, in particular, the onset of her neck and back complaints. When this error was pointed out to him at his deposition, Dr. MacMillan agreed hypothetically that the mechanism of injury with simultaneous neck and back symptoms could aggravate a degenerative disc condition but he would not change his opinions with respect to the claimant in this case. His explanation is not persuasive. The Board finds the opinions of Dr. Pazell to be supported by the evidence, including the mechanism of injury, the claimant's medical history, and the history of her symptoms. His conclusions are likewise supported by the reports of the court-ordered independent medical examiner, Dr. Pratt, and the results of the MRI testing. Claimant's degenerative disc disease preexisted her May 23, 2007, work-related accident, but she was able to work without restrictions or accommodations before that accident. There is no evidence of preexisting disability or impairment. The Board agrees with and adopts the findings and conclusions of the ALJ.

¹¹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

CONCLUSION

(1) Claimant suffered permanent injury and disability as a direct result of the May 23, 2007, automobile accident.

(2) Claimant's injuries are aggravations of preexisting conditions but before the work-related accident claimant was asymptomatic and she had neither preexisting impairment nor restrictions. As claimant had neither a disability nor an impairment that preexisted her accident, respondent is not entitled to any credit or offset against the permanent partial disability award.

(3)(a) Claimant is not permanently totally disabled.

(b) Claimant has a 100 percent wage loss but has failed to prove her percentage of task loss. She is, therefore, entitled to an award of permanent partial disability based upon a 50 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia L. Yates dated July 28, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates, Administrative Law Judge